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No. 94-158

In The

Supreme Court of the United States

October Term, 1994

L. BATES,

Petitioner,

v.

ROBERT WALKER,

Respondent.

JOHN MAHONEY,

Petitioner,

v.

MICHAEL MAYS,

Respondent.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF AMICI CURIAE OF THE STATES OF HAWAII, ALABAMA, ALASKA, ARIZONA, ARKANSAS, CALIFORNIA, COLORADO, CONNECTICUT, DELAWARE, FLORIDA, IDAHO, KANSAS, KENTUCKY, LOUISIANA, MARYLAND, MICHIGAN, MISSISSIPPI, MONTANA, NEBRASKA, NEVADA, NEW HAMPSHIRE, NEW JERSEY, NEW MEXICO, NORTH CAROLINA, OHIO, OKLAHOMA, OREGON, PENNSYLVANIA, RHODE ISLAND, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, VERMONT, VIRGINIA, WISCONSIN, WYOMING, DISTRICT OF COLUMBIA AND AMERICAN SAMOA IN SUPPORT OF PETITIONERS

ROBERT A. MARKS
Attorney General
State of Hawaii
STEVEN S. MICHAELS*
Deputy Attorney General
State of Hawaii
*Counsel of Record

425 Queen Street
Honolulu, Hawaii 96825
(808) 586-1365
Counsel for Amicus Curiae State of Hawaii (Other Counsel of Record Listed on Inside Front Cover).

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

25 pp

Hon. Jimmy Evans
Attorney General of Alabama
Office of the Attorney General
State House
11 South Union Street
Montgomery, Alabama 36130
(205) 242-7300

Hon. Bruce M. Botelho
Attorney General of Alaska
Office of the Attorney General
P.O. Box 110300
Juneau, Alaska 99811
(907) 465-3428

Hon. Grant Woods
Attorney General of Arizona
Office of the Attorney General
1275 West Washington
Phoenix, Arizona 85007-2926
(602) 542-4266

Hon. Winston Bryant
Attorney General of Arkansas
Office of the Attorney General
200 Tower Building
323 Center Street
Little Rock, Arkansas 72201-2610
(501) 682-2007

Hon. Daniel E. Lungren
Attorney General of California
Office of the Attorney General
1515 K Street
Sacramento, California 95814
(916) 324-5437

Hon. Gale A. Norton
Attorney General of Colorado
Office of the Attorney General
State Services Building
1525 Sherman Street, 5th Floor
Denver, Colorado 80203
(303) 866-4500

Hon. Richard Blumenthal
Attorney General of Connecticut
Office of the Attorney General
55 Elm Street
P.O. Box 120
Hartford, Connecticut 06141-0120
(203) 566-2026

Hon. Charles M. Oberly, III
Attorney General of Delaware
Department of Justice
State Office Building
820 N. French Street, 8th Floor
Wilmington, Delaware 19801
(302) 577-2500

Hon. Robert A. Butterworth
Attorney General of Florida
Office of the Attorney General
The Capitol
PL 01
Tallahassee, Florida 33239-1050
(904) 487-1963

Hon. Larry Echohawk
Attorney General of Idaho
Office of the Attorney General
P.O. Box 83720
Boise, Idaho 83720-0010
(208) 334-2400

Hon. Robert T. Stephan
Attorney General of Kansas
Office of the Attorney General
2nd Floor, Kansas Judicial Center
Topeka, Kansas 66612-1597
(913) 296-2215

Hon. Chris Gormon
Attorney General of Kentucky
Capitol Building, Suite 114
Frankfort, Kentucky 40601
(502) 764-7600

Hon. Richard P. Ieyoub
Attorney General of Louisiana
Office of the Attorney General
Department of Justice
P.O. Box 94005
Baton Rouge, Louisiana 70804-9005
(504) 342-7013

Hon. J. Joseph Curran, Jr.
Attorney General of Maryland
Office of the Attorney General
200 St. Paul Place
Baltimore, Maryland 21202
(410) 576-6300

Hon. Frank J. Kelley
Attorney General of Michigan
Office of the Attorney General
Post Office Box 30212
525 West Ottawa Street
Lansing, Michigan 48909-0212
(517) 373-1110

Hon. Mike Moore
Attorney General of Mississippi
Office of the Attorney General
Carrol Gartin Justice Building
Post Office Box 220
Jackson, Mississippi 39205-0220
(601) 359-3680

Hon. Joseph P. Mazurek
Attorney General of
Montana
Office of the Attorney
General
Justice Building
P.O. Box 201401
Helena, Montana
59620-1401
(406) 444-2026

Hon. Don Stenberg
Attorney General of
Nebraska
Office of the Attorney
General
State Capitol
Post Office Box 98920
Lincoln, Nebraska
68509-8920
(402) 471-2682

Hon. Frankie Sue Del Papa
Attorney General of
Nevada
Office of the Attorney
General
Capitol Complex
Carson City, Nevada 89710
(702) 887-4170

Hon. Jeffrey R. Howard
Attorney General of
New Hampshire
Office of the Attorney
General
State House Annex
25 Capitol Street
Concord, New Hampshire
03301-6397
(603) 271-3658

Hon. Deborah T. Poritz
Attorney General of
New Jersey
Office of the Attorney
General
Richard J. Hughes Justice
Complex
25 Market Street
CN112
Trenton, New Jersey
08625-0112
(609) 984-9664

Hon. Tom Udall
Attorney General of
New Mexico
Office of the Attorney
General
Post Office Drawer 1508
Santa Fe, New Mexico
87504-1508
(505) 827-6000

Hon. Michael F. Easley
Attorney General of
North Carolina
Office of the Attorney
General
Department of Justice
Post Office Box 629
Raleigh, North Carolina
27602-0629
(919) 733-3377

Hon. Lee Fisher
Attorney General of Ohio
Office of the Attorney
General
30 East Broad Street,
17th Floor
Columbus, Ohio
43215-3428
(614) 466-3376

Hon. Susan B. Loving
Attorney General of Oklahoma
Office of the Attorney General
2300 N. Lincoln Boulevard, Suite 112
Oklahoma City, Oklahoma 73106-4894
(405) 521-3921

Hon. Theodore R. Kulongoski
Attorney General of Oregon
Office of the Attorney General
100 Justice Building
Salem, Oregon 97310
(503) 378-4402

Hon. Ernest D. Preate, Jr.
Attorney General of Pennsylvania
Office of the Attorney General
15th Floor, Strawberry Square
Harrisburg, Pennsylvania 17120
(717) 783-1471

Hon. Jeffrey B. Pine
Attorney General of Rhode Island
Office of the Attorney General
72 Pine Street
Providence, Rhode Island 02903
(401) 274-4400

Hon. T. Travis Medlock
Attorney General of South Carolina
Office of the Attorney General
Post Office Box 11549
Columbia, South Carolina 29211
(803) 734-3970

Hon. Mark Barnett
Attorney General of South Dakota
Office of the Attorney General
500 East Capitol Avenue
Pierre, South Dakota 57501-5070
(605) 773-3215

Hon. Jan Graham
Attorney General of Utah
Office of the Attorney General
236 State Capitol
Salt Lake City, Utah 84114
(801) 538-9600

Hon. Jeffrey L. Amestoy
Attorney General of Vermont
Office of the Attorney General
109 State Street
Montepelier, Vermont 05609-1001
(802) 828-3171

Hon. James S. Gilmore, III
Attorney General of Virginia
Office of the Attorney General
Supreme Court Building
101 North Eighth Street, Fifth Floor
Richmond, Virginia 23219
(804) 786-2071

Hon. James E. Doyle
Attorney General of Wisconsin
Office of the Attorney General
State Capitol
Post Office Box 7857
Suite 114 East
Madison, Wisconsin 53707-7857
(608) 266-1221

Hon. Joseph B. Meyer
Attorney General of Wyoming
Office of the Attorney General
123 Capitol Building
Cheyenne, Wyoming 82002
(307) 777-7841

Hon. Vanessa Ruiz
Corporation Counsel of the District of Columbia
Office of the Corporation Counsel
441 – 4th Street, NW
Washington, D.C. 20001
(202) 727-6248

Hon. Malaetasi Togafau
Attorney General of the Territory of American Somoa
Office of the Attorney General
Post Office Box 7
Pago Pago, American Samoa 96799
(684) 633-4163

QUESTION PRESENTED

Whether the Civil Rights Act of 1871, 42 U.S.C. § 1983, provides a prisoner a damages remedy for more restrictive confinement during the pendency of appeal which promptly reversed a procedurally defective disciplinary hearing?

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INTEREST OF THE AMICI CURIAE

The Amici States have an abiding interest in this case, in which the parameters of this Court's decisions in *Parratt v. Taylor*, 451 U.S. 527 (1981), *Hudson v. Palmer*, 468 U.S. 517 (1984), and *Zinermon v. Burch*, 494 U.S. 113 (1990), as well as Due Process doctrine generally, are vitally at play in an area of great concern to the States: Litigation by prisoners challenging prison disciplinary findings on procedural Due Process grounds. Each of the Amici States operates prison systems that house some of the most dangerous and intractable individuals in this Nation. These individuals, as this Court has recognized on numerous occasions, frequently present enormous disciplinary problems. It is precisely for this reason that this Court held, twenty years ago, that, "[a]s the nature of the prison disciplinary process changes in future years, circumstances may then exist which will require further consideration and reflection of this Court." *Wolff v. McDonnell*, 418 U.S. 539, 572 (1974).

Challenges to disciplinary committee findings are of great import to the States. Informal estimates by the Attorneys General joining in this Brief confirm that as much as 30 to 40 percent of prisoner litigation under 42 U.S.C. § 1983 exists solely to challenge prison disciplinary findings. At the same time, as demonstrated, *infra*, the States have taken extraordinary steps, within their own prison systems, to provide detailed guidelines to disciplinary officers, as well as prompt appeal processes. In fact, every State has provided for administrative review of some kind of prison disciplinary hearing processes,

even when that review is plainly not required by the Due Process Clause.

The Amici States submit that the confluence of this fact with the arguments presented by Petitioners make these cases especially deserving of this Court's resources. In the cases below, the Second Circuit, in conflict with the views of five other Circuits (two sitting *en banc*), accepted the claim that prison disciplinary findings that were promptly reversed for breach of clear procedural rules could nonetheless provide the basis for a damages remedy under 42 U.S.C. § 1983, notwithstanding the decisions in *Parratt*, *Hudson*, and *Zinermon*.

In contrast to the Second Circuit's analysis here, the *Parratt* trilogy generally recognizes that, where state officials lack "broad authority to deprive prisoners of their personal property" or liberty, "postdeprivation process is all that is due because no [further] predeprivation safeguards would be of use in preventing the kind of deprivation alleged." *Zinermon*, 494 U.S. at 138, 139. Here, where the State has provided detailed guidance to hearing officers, and provided for a prompt appeal, "the *state*" is not "in a position to provide for [further] predeprivation process." *Parratt*, 451 U.S. at 534.

REASONS FOR GRANTING THE WRIT

I. The Decision of the Second Circuit Raises Bedrock Questions Concerning the Operation of the Due Process Clause in the Context of Prison Disciplinary processes, Issues of Nationwide Import by Any Standard.

In casting aside New York's vehicles for avoiding mere procedural error in prison disciplinary matters, the Second Circuit has addressed a recurring issue of nationwide import. Indeed, because the decision below is relevant to claims filed *in every State* by prisoners seeking damages relief, under 42 U.S.C. § 1983, from prison officials as a result of prison disciplinary findings, the petition here should be granted.

In the wake of this Court's decision in *Wolff v. McDonnell,* States have taken enormous steps to provide detailed procedures regulating prison disciplinary decisionmaking. Of perhaps the most significance here are the States' extensive efforts in providing administrative appeals.[1] These efforts parallel procedures espoused by

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[1] The States; administrative regulations providing for appeal procedures are reported, respectively, at: Ala. Dep't of Corrections, Admin. Reg. § 403 (1992); Alaska Dep't of Corrections, 22 AAC § 05.480, 05.485 (1987); Ariz. Dep't of Corrections, Rules of Discipline R5-1-604 (1986); Ark. Dep't of Correction, Admin. Reg. § 831 (1990); Cal. Code Regs. tit. 15 §§ 3084 *et seq.* and 3315(g) (1993); Colo. Dep't of Corrections, Code of Penal Discipline, § 203-1 (1984); Conn. Dep't of Correction, Admin. Directive. No. 9.5 (1994); Del. Bureau of Prisons, *Proc. Man.*, Ch. 4 (1992); Fla. Dep't of Corrections Rules, Ch. 33-22 (1986), as amended, Ch. 33-29 (1992); Ga. Dep't of Corrections, Standard Operating Procedures, IIB02-0001 (1992); Haw. Admin. Reg.

the Federal Bureau of Prisons (*see* 28 C.F.R. § 541.19 (1993)), and provide for rights to appeal, or automatic

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§ 17-201-20 (1983); Idaho Dep't of Correction, Policy & Proc. Man. § 318-C (1987); Ill. Dep't of Corrections, Tit. 20, Ch. 1: Subch. e, Rule 504F (1988); Ind. Dep't of Corrections, Admin. Proc. Man. of Policies & Proc, 02-04-101 (1994); Iowa Div. of Institutions, Dep't Policy & Proc. IN-V-36 (1984); Kan. Admin. Reg. art. 44-13-701-44-13-707 (1992); Ky. Corrections Policies & Proc. § 15.6 (1992); La. Dep't of Public Safety & Corrections, Disciplinary Rules and Proc. for Adult Inmates (1st ed. 1993); Me. Dep't of Corrections, Client Disciplinary Procedures, Ch. 15.1 (1994); Md. Div. of Correction Reg., DCR No. 105-2 (1988); 103 Com. Mass. Reg. 430.00, 430.18, 430.19 & 430.22 (1992); Mich. Dep't of Corrections, Mich. Comp. L. 791.251 *et seq.* (1994 Supp.); Minn. Dep't of Corrections, Policy & Proc. Discipline Plan (1988), and Inmate Discipline Reg. (1993); Miss. Dep't of Correction, Administrative Remedy Program (1994); Mo. Dep't of Corrections and Human Resources, Institutional Services Policy and Proc. Man., IS8-2.1 (1992), IS19-1.3 and IS19-1.4 (1994); Mont. Dep't of Corrections and Human Services, Mont. State Prison Policy Statement, MSP 15-001 (1989); Neb. Dep't of Correctional Services, Title 68, Ch. 6 (1994); Nev. Dep't of Prisons, Code of Penal Discipline (1993); N.H. Dep't of Corrections Policy and Proc. Directive, Enforcement OP. Statement No. 1.5.25 (1993); N.J. Admin. Code tit. 10A, subch. 11 (1994); N.M. Corrections Department, Inmate Discipline Reg. CD-090301 (1991), and Inmate Discipline for Minimum and Minimum Restrict Custody Facilities, CD-0-0101 (1992); N.Y. Comp Code R. & Regs. tit. 7 §§ 253.8, 254.8 (1983); N.C. Div. of Prisons, Policies & Proc. §§ .0200.0204 (1994); N.D. Dep't of Corrections & Rehabilitation Policies & Proc. Man. (Inmate Rules and Discipline) (1994); Ohio Dep't of Rehabilitation and Correction, Inmate Disciplinary Manual, OAC Rule 5120-9-09 (K)-(M) (1993); Okla. Dep't of Corrections, Policy & Operations Manual: Classification and Case Management Disciplinary Procedures OP-060125 (1993); Or. Admin. R. 291-105-073 (1993); Pa. Dep't of Corrections, Inmate Disciplinary & Restricted Housing Procedures, DC-ADM 801 (1992); R.I. (by order in *Morris v. Travisono*, 499

administrative review, and mandatory decisionmaking periods, in which the appeal must be decided. With the exception of six States (Indiana, Maryland, Michigan, Oklahoma, Utah, and West Virginia), all States provide directives requiring a response to inmate administrative appeals within at least 60 days.[2] At that same time, only fourteen States have provisions that suspend penalties or sanctions during administrative appeal.[3]

A decision in this case would provide guidance to all prison administrators, and to every federal judicial District (and all state courts, which hear 42 U.S.C. § 1983

F.Supp. 149 (1980)); S.C. Dep't of Corrections, Inmate Disciplinary Hearings § 1500.24 (15/24) (1994); S.D. State Penitentiary, R. & Discipline 3C.3 (Prop. Draft); Tenn. Dep't of Corrections, Admin. Policies & Proc. § 502.01 (1993); Tex. Institutional Div., Disciplinary Rules and Procedures for Inmates (1993); Utah Dep't of Corrections, Disciplinary Due Process Proc. FDr 01/05.00 (1994); Vt. Dep't of Corrections, Inmate Disc (1021), Policy #410 (1991); Va. Dep't of Corrections, Div. of Adult Institutions Operating Proc. 861 (1992); Was. Div. of Prisons, Div. Directive, DOP 461 (1991); W.V. Dep't of Corrections, Policy Directive § 670.00 (1991); Wis. Div. of Adult Institutions Rules of Department of Corrections 303.75, 303.76 (1990); Wyo. Dep't of Corrections, Code of Inmate Discipline (1994). See also 28 D.C. Mun. Regs. §§ 513.1, 513.9 (1987).

[2] In Alabama, the entire process cannot exceed 60 days, while Wisconsin does not provide a deadline for minor offenses, and Indiana merely requires a response "in a timely manner." Many states provide for review in periods shorter than 60 days.

[3] Four States (Alaska, Delaware, Iowa, and Maine) stay all punishment until the appeal process is completed; six States (Arizona, Minnesota, New Jersey, Rhode Island, Tennessee, and Washington) require approval to suspend sanctions; three States (Kansas, Massachusetts (isolation only), and North Dakota (loss of good time only)) suspend certain sanctions pending appeal.

claims as well) in the fifty States as to the adequacy, under *Parratt*, *Hudson*, and *Zinermon*, of these appeal procedures in satisfying the mandates of the Fourteenth Amendment's Due Process Clause. Indeed, if Petitioners' claims have merit, and are granted by this Court, this case has the potential to eliminate thousands of cases from the docket of the federal judiciary, allowing for greater federal judicial attention to the *substantive* claims of prisoners under the First or Eighth Amendments, or on review of their convictions themselves pursuant to 28 U.S.C. § 2254. A decision in favor of the New York officials in this case would not, of course, in any way diminish the importance of the Due Process Clause, and, in particular, the protections of procedural Due Process, which "serve the purpose of making an individual feel that the government has dealt with him fairly." *Williamson County Regional Planning Commission v. Hamilton Bank*, 473 U.S. 172, 196 n.14 (1985). Rather, it would eliminate the elevation of "form over substance, and labels over reality," *Bowen v. Gilliard*, 487 U.S. 587, 606 (1987), which has characterized procedural Due Process analysis in a minority of the federal Circuits, and which has led to a flood of Due Process suits under 42 U.S.C. § 1983 whose only likely result is an award of nominal damages for mere procedural error, and a strong message to the States in those Circuits that their extensive efforts to provide protection against procedural error are meaningless.

For these reasons alone, this Court should grant review.

II. The Decision of the Second Circuit Severely Undercuts the Reasoning of this Court in *Parratt*, *Hudson*, and *Zinermon*, and Ultimately Charts a Sea-Change in Due Process Doctrine.

As is ably demonstrated in the Petition, the Second Circuit's decision in this case flouts the reasoning of the majority (and, a fortiori, that of the dissenters) in *Zinermon v. Burch*, 494 U.S. 113 (1990), the most recent exposition of the rule recognized in *Parratt v. Taylor*, 451 U.S. 527, 534 (1981), that where "the state" is not "in a position to provide for [further] predeprivation process," post-deprivation procedures provide the "process due" for federal constitutional purposes.

To reach this result, the Second Circuit did not dispute that New York's disciplinary procedures comported with *Wolff v. McDonnell*, 418 U.S. 539 (1974), and its progeny, but nonetheless held that the mere breach of these detailed requirements, even if corrected promptly on administrative appeal, "constitutes, without more, a compensable constitutional due process violation." Pet. App. 8a. Here, in contrast to *Zinermon*, New York did not delegate "a broad power" (494 U.S. at 113) to its hearing officers; indeed, the swift reversals of discipline in these cases show just the opposite. Ironically, the Second Circuit relied heavily on this Court's decision in *Cleavinger v. Saxner*, 474 U.S. 193 (1985), and in particular on the following characterization of the inherent qualities of prison disciplinary procedures that render absolute immunity for hearing committee members inappropriate under § 1983:

> [Disciplinary committee members] are not professional hearing officers, as are administrative

> law judges. . . . They are employees of the Bureau of Prisons and they are the direct subordinates of the warden who reviews their decision. They work with the fellow employee who lodges the charge against the inmate upon whom they sit in judgment. The credibility determination they make often is one between a co-worker and an inmate. . . . It is the old situational problem of the relationship between the keeper and the kept, a relationship that hardly is conducive to a truly adjudicatory performance.

Id. at 203-04, quoted at Pet. App. 10a. This characterization of the prison disciplinary process, however, only emphasizes why further *predeprivation* procedures are either "unduly burdensome" or "truly unable to anticipate and prevent a random deprivation of a liberty interest." *Zinermon*, 494 U.S. at 132. The very fact that hearing officers cannot be expected to come to their decisions with the objectivity expected of say, federal or state judges, indicates only that "the State might be able to predict that [such officers] occasionally will harass or persecute prisoners they dislike" through erroneous evidentiary or other procedural rulings. *Id.* at 136. But, unless the federal judiciary is prepared to require true "judicial officers" for the hundreds of thousands (or more) of inmate discipline cases that are disposed of in this Nation's prisons – and this Court's decisions make it plain that it is not (*see Wolff*, 418 U.S. at 571) – then the most that can be said of New York's remedial scheme in these cases is that "the State" "cannot 'know when such deprivations will occur.' " *Zinermon*, 494 U.S. at 136 (quoting *Hudson v. Palmer*, 468 U.S. at 533). Under these facts,

the New York correctional officers are not liable under § 1983.

Indeed, the Second Circuit's decision in this case makes nonsense of "the special instance of the *Mathews* due process analysis where postdeprivation process is all that is due[.]" *Id.* at 139. In the instant cases, for example, none of the prisoners were threatened with an unreviewed denial of good time credits that actually lengthened their time behind bars; at most, the inmates at issue faced additional time in segregated housing that, in material terms, was identical to the time they spent in "administrative segregation" prior to their hearings.

Such a minimal deprivation should be compared with the sorts of deprivations this Court has allowed to be inflicted wholly by *ex parte* procedure. In *Federal Deposit Insurance Corporation v. Mallen,* 486 U.S. 230 (1988), this Court held that bank officers could be summarily suspended, without pay, and without any finding of guilt, merely on the basis of a grand jury indictment, and that such suspension could be maintained for periods of up to 90 days without any administrative review. The Court emphasized that "it is appropriate to examine the importance of the private interest and the harm to this interest occasioned by delay; the justification offered by the Government for the delay and its relation to the underlying governmental interest; and the likelihood that the interim decision may have been mistaken." *Id.* at 242. Despite "the severity of depriving someone of his or her livelihood," even a ninety-day delay fails to exceed "permissible limits." *Id.* at 243. Equal, if not greater considerations of public safety are at stake in the prison disciplinary context. For, while the Government owes no

duty whatever to protect the public from the foibles of the private market, *see DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989), the duty to maintain good order and discipline within a prison population is one grounded in the Constitution, and, specifically, in the Eighth and Fourteenth Amendments' *substantive* scope, itself. *See Farmer v. Brennan*, 114 S.Ct. 1970 (1994). The Second Circuit's decision in this case is nothing less than a Constitutional whipsaw, imposing on officials an "undue burden" and further predeprivation procedure that "is truly unable to anticipate and prevent a random deprivation of a liberty interest."[4] *Zinermon*, 494 U.S. at 132. Review should be granted.

III. Review Should Be Granted to Address the Gaping Circuit Split Concerning the Meaning of *Parratt*, *Hudson*, and *Zinermon*.

Amici's position that New York's appeal procedure provides the "process due," is not grounded merely in their own reading of the *Parratt* trilogy. Rather, as Petitioners point out, *see, e.g.*, Pet. at 12-13, the decision below conflicts directly, or, in principle, with the reasoning of five other Courts of Appeals. *See McKinney v. Pate*, 20 F.3d 1550, 1561-64 (11th Cir. 1994) (en banc); *Zar v.*

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[4] It is open to question, as well, whether, in the absence of an actual post-process denial of good-time credits, New York actually "deprived" any of the inmates here of a "liberty interst" at all. *See* the Pets. for Cert. in *Sandin v. Conner* and *Harper v. Mujahid*, Nos. 93-1911 and 94-43 (US. conf. pending). The "liberty interest" issue is not raised in this case, however, and thus we assume a "liberty interst" is present.

South Dakota Board of Examiners, 976 F.2d 459, 465 (8th Cir. 1992); *Lowe v. Scott*, 959 F.2d 323, 344 (1st Cir. 1992); *Caine v. Hardy*, 943 F.2d 1406, 1414 (5th Cir. 1991) (en banc), *cert. denied*, 112 S.Ct. 1474 (1992); *Easter House v. Felder*, 910 F.2d 1387, 1404 (7th Cir. 1990), *cert. denied*, 498 U.S. 1067 (1991); *but see Winters v. Board of County Commissioners*, 4 F.3d 848 (10th Cir. 1993); *Plumer v. State of Maryland*, 915 F.2d 927 (4th Cir. 1990). Although the decisions in this area do not arise precisely in the prison context, they all concern administrative disciplinary processes in which federal deference to state decisionmaking is *less* compelling than in the prison context. This fact, and that eight of the Courts of Appeals have weighed in on the issue, with a clear minority view persisting despite the weight of precedent in favor of Petitioners, strongly counsels granting review.

CONCLUSION

For the foregoing reasons, certiorari should be granted.

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ROBERT A. MARKS
Attorney General
State of Hawaii
STEVEN S. MICHAELS*
Deputy Attorney General
State of Hawaii
*Counsel of Record
425 Queen Street
Honolulu, Hawaii 96825
(808) 586-1365
Counsel for Amicus Curiae State of Hawaii (Other Counsel of Record Listed on Inside Front Cover).